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'Prefer Not to Say: Diversity and Diversity Reporting at the Bar of England & Wales'

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ABSTRACT

The Bar of England & Wales, like the wider legal profession, does not reflect the society it serves. The current data published by the Bar Standards Board (BSB) suggests a profile in relation to gender and ethnicity that gives serious cause for concern. As regards additional diversity characteristics, the BSB (and others) have accepted that the existing data sets are not wholly reliable because of poor response rates to associated diversity questionnaires. In 2011, the Legal Services Board (LSB) introduced mandatory guidance that obliged its daughter regulators to put into place rules that relate to diversity monitoring and reporting across the legal profession. This paper is concerned with how the BSB has operationalised that statutory guidance in respect of the Bar. Drawing on data gathered from the websites of 160 chambers, I show significant non-compliance with the reporting rule, and question both how the BSB itself reports on diversity data and the drafting of the reporting rule. I ask whether non-compliance is partly a function of the complexity seen in how the BSB has made operational the LSB's reporting requirements. My data also suggests that the BSB should target its enforcement and educational approaches to the reporting rule to small and medium sized chambers.

KEYWORDS

barrister; diversity; reporting; legal profession;

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The legal profession in England & Wales is divided: there are 9 types of regulated professional undertaking various forms of legal services, and 9 corresponding ‘approved regulators’ doing their work under the auspices of the overarching Legal Services Board (LSB).ⁱ The sector is thought to comprise around 400,000 individuals (LETR, 2013: Ch3), of whom around half are regulated by a legal regulator.ⁱⁱ The majority of the scholarly work on the legal profession in England & Wales has focussed on solicitors, who, at an August 2015 population of 133,837 are the most numerous of our regulated lawyers.ⁱⁱⁱ The second largest group, barristers, numbering 15,716 in 2014,^{iv} have received comparatively little attention by scholars. This paper attempts to fill a small part of that gap. Its focus is on diversity at the Bar and, in particular, on the real world application of statutory guidance issued by the LSB which requires the collection and reporting of diversity data on (and by) lawyers. I draw on a dataset generated during the summer of 2015 from 180 multi-tenant chambers (groupings of multiple barristers working under the same roof), half of the entire population of chambers in England & Wales.

This paper unfolds in four parts. The paper begins with a short introduction to the Bar. It goes on to outline what we know about diversity in the legal profession in England & Wales, and draws on the limited work on barristers. It also sets out the content of the diversity collection and reporting rule introduced by the LSB as a consequence of research it commissioned in 2010 (Sommerlad et al, 2010), and comments on how that rule has worked thus far. The second part of the paper then sets an overview of the Bar, both in terms of how the working lives of barristers differ from those of solicitors, and in numerical terms: that is, what we currently know about who works at the Bar. Part three contains the data collected from the summer 2015 review of multi-tenant chambers and a short note on methodology.

The paper concludes with a discussion of this data. What we see are clear instances of regulatory failure, both on the part of the Bar Standards Board (BSB) – the LSB daughter regulator with responsibility for barristers - and of the chambers that the BSB regulates. The BSB's introduction of the LSB's reporting rule leaves much to be desired, and is a weaker operationalization of that rule compared with its sister regulator, the Solicitors Regulation Authority. There is widespread non-compliance by chambers with the BSB's reporting rule, the apparent misinterpretation of regulatory requirements by those chambers, and a disclosure of meaningful data for only a handful of the protected diversity characteristics. 'Large' chambers (i.e. those with 51+ members) are significantly more likely than small or medium chambers to disclose diversity data. This may have important implications for how the BSB targets its compliance and/or education functions in relation to the diversity monitoring and publication rules. The BSB has recently undertaken a review of chambers' compliance with its rules, targeted at 'high impact' chambers (BSB, 2015b). My data suggests that this targeting was the wrong regulatory approach in the context of the diversity monitoring and reporting rule.

The Bar of England & Wales

Barristers are specialist advocates and, until 1990, had a virtual monopoly on advocacy in England & Wales.^v They begin their professional lives with a law degree (or a non-law degree followed by a one year 'conversion' law course), take the postgraduate Bar Professional Training Course (BTPC) and are then 'called' to the Bar by one of the four Inns of Court, which have educational and collegiate functions (Palfreyman, 2011). Post 'call', they are able to call themselves a barrister, but not yet able to practise unsupervised. The next stage is pupillage, where trainee barristers spend a year learning on the job (or, as Pirie and Rogers put it, spend a year being continuously interviewed for potential future employment (2013)). The pupil sits with a pupil supervisor (formerly known as a 'pupil master' or 'pupil mistress'). The year is split into two blocks: a 'first six' (where the pupil shadows their supervisor and undertakes research etc, but does not do their own work); and a 'second six'

(where pupils can take on their own work and appear in court). At the end of their pupillage, pupils seek 'tenancy' or membership of chambers.

Chambers are, literally, the rooms occupied by barristers but the term 'chambers' (or 'set') tends to be used to denote groupings of barristers under a single name (e.g. "29 Bedford Row", "Landmark Chambers) in one or more locations. On a more abstract level, chambers can be understood in terms of the spacial and social organisation of the Bar into medieval brotherhood-like groupings. The vast majority of chambers are located in London and vary significantly in size: some may house only one or two barristers; the largest may house 200. The BSB labels any chambers as 'large' if it has more than 50 members. The Bar is a complex organisation: radical chambers which push certain progressive areas of law and agendas; 'slick' chambers that resemble (to varying degrees) the largest corporate law firms; and the backwoods chambers of the the regions that engage in a struggle for high end work.

Unlike law firms, which are owned (usually, but not exclusively) by the partners,^{vi} with employee solicitors and others working for those partners, the barristers in chambers are all self-employed.^{vii} They do not share profits with each other (save via contributions to chambers for things like real estate maintenance, IT and other support functions). Their work commonly comes via solicitors who instruct them on behalf of their clients. Since 2004, however, clients have been able to instruct barristers themselves without the solicitor intermediary via a process known as 'direct access' (Flood & Whyte, 2009). Barristers' clerks act as intermediaries in the giving of work from solicitors to barristers, and otherwise act as support for the members of chambers (Flood, 1983).

Progression at the Bar appears in various forms. Certain barristers 'take silk' and are known as QCs (Queens Counsel). Becoming a QC was once a matter of nods and winks, an informal 'old boys club' (Sommerlad, 2013), but is now a seemingly independent process which begins with an application by the barrister to QC Appointments.^{viii} The other significant route of progression for barristers is to join

the judiciary which, while outside the scope of this paper, has its own challenges in the context of diversity and inclusion (Malleeson, 1999 and 2010; Rackley, 2013).

As noted in my introduction, solicitors outnumber barristers more than 8:1. However, both branches of the profession have experienced significant growth. The Bar had nearly trebled in size in the years between 1960 and 1990, and then virtually doubled again between 1990 and 2004. (LETR, 2013: Ch3) Following the regulatory settlement of the Legal Services Act 2007, the Legal Services Board (LSB) became the overarching regulator of all legal services in England & Wales. The LSB regulates various ‘approved regulators’, each with responsibility for one or more regulated lawyer groups. For barristers, the Bar Standards Board (BSB) is the regulator, with a separate (in theory) representative body in the form of the Bar Council. The main source of regulation from the BSB is found in its Handbook, introduced in January 2014.^{ix}

Diversity at the Bar

There has been a sustained inquiry into diversity in the legal profession in England & Wales for three decades (see, for example: Ashley, 2010; Sommerlad, 1994, 1995, 2007, 2008; Sommerlad et al, 2010; Suresh 2014). However, almost all of this work has been on solicitors and law firms. There is a striking lack of scholarly work on the Bar compared with the solicitor’s branch of the legal profession (aside from the sustained focus given by Mason, Rogers and Zimdars), and in particular a deficit of work focusing on diversity at the Bar (for notable exceptions, see: Holland & Spencer, 1992; and Polden, 1995). This was also the conclusion of Rosemary Hunter in 2005 (Hunter, 2005). It is fair to say that very little has changed in the intervening decade.

Hunter found that women barristers in Australia were largely confined to “the less prestigious and less remunerative courts, practices areas and cases”, and were prevented from career advancement due to the ways in which work was allocated to them (Hunter, 2005: 42-43).^x The power of clerks in allocating, or not allocating, work to female lawyers has been a recurrent theme ever since women

were first allowed to join the English Bar in 1919 (Polden, 2005; Bar Council, 2014: 41). The segregation of women into certain areas of practice is also seen at the English Bar (Rogers, 2012: 220), with women are far more likely to specialise in Family Law and far less likely to specialise in (the highly remunerative) Corporate Law (Bar Council, 2013 and 2015). Earlier work on barristers in England & Wales has found that women faced significant barriers both in obtaining pupillage and then, at the end of their pupillage, in being retained as a tenant at chambers (Holland & Spencer, 1992). The picture is more complex today. We know that entry to the Bar relies on prior educational achievement, which has negative impacts on certain groups (for example, would-be black and Asian minority ethnic barristers (Zimdars, 2011). We also know that women and older pupils earn less during their pupillage (Zimdars and Sauboorah, 2009), and that barristers who attended the universities of Oxford or Cambridge are more likely to have higher earnings and more likely to work in London ((Zimdars, 2010). The link with prior educational achievement is perhaps part of the Bar's "self portrait" of excellence (Rogers, 2012: 203). Recent work has shown that, despite the changes outlined above regarding appointment to Queen's Counsel, women remain statistically less likely than men to be so appointed (Blackwell, 2015).

As set out above, the existing scholarly work on diversity at Bar has taken various snapshots of different groups at different stages (pupil > tenant > QC > judge). The regulators' portrayal of diversity at the Bar is equally fragmented. On its website, the BSB has a webpage titled 'Statistics' which contains data for "the life cycle of the Bar - from entry to Queen's Counsel".^{xi} For practising barristers, there is data on age, ethnicity and gender from 2010-2014. The same spread of data exists for Queen's Counsel, and for pupil barristers. Raw data is given and the BSB does not provide any percentages, which leaves the reader obliged to calculate overall numbers and then relative proportions for each part of the "life cycle" and each protected characteristic that is reported on. The numbers which follow are taken from those webpages. Male pupil barristers continue to outnumber female pupils (55% to 45%). Whereas, with the solicitors' branch of the profession there is almost parity in gender (until partner level),^{xii} this is not true at the Bar. Since 2010, the proportion

of female practising barristers has remained almost static. In 2014, 35.4% of practising barristers were female, but only 13.3% of Queen's Counsel are not male. 15.7% of pupils, 12.7% of practising barristers, and 6.7% of Queen's Counsel are reported as BAME but, unlike the Law Society (which produces comprehensive annual statistical reports), the BSB does not break this data down further (Black African, Chinese etc). It is unclear why the 'Statistics' page does not also report on disability, as data has been collected on this characteristic by the Bar for some time (BSB, 2014a:12).

The BSB produced 'Bar Barometer Reports' in 2011, 2012, and 2014.^{xiii} The 2014 Barometer reports on a (slightly) wider spread of protected characteristics than reported on via the 'Statistics' webpage. In the Introduction to the June 2014 Barometer (2014b: 8), the BSB comments that,

"In line with changes in legislation, information relating to the majority of the protected characteristics is now collected for all the main stages of training to practise at the Bar."

While this may be the case, such data is not disclosed on the 'Statistics' page. What is particularly striking about the 2014 Barometer is that data for 'first six' barrister pupils is given in relation to sexual orientation, secondary school attended, university attended, university grades and caring responsibilities (in addition to age, gender, disability and ethnicity) but such data is *not* given for any other part of the Bar "life cycle". The reasons for this are not set out in the Barometer. However, such data *can* be found if one looks at the 2013 and 2014 'Diversity Data Reports' that the BSB produces.^{xiv} These two reports contain snapshots of the Bar across each and every characteristic, and split between pupils, practising barristers and QCs. However, the amount of data is relatively poor, with low response rates for a number of characteristics. I discuss this further below.

The two Diversity Data Reports are housed on the BSB's 'Equality and Diversity' webpages;^{xv} while the various 'Barometers' and the 'Statistics' pages are housed separately under a 'Research and

Statistics' section to the BSB website, the former under 'Research' and the second under 'Statistics'. I make this point as the various reports and pages contain different amounts of types of information, such that varying perceptions as to diversity at the Bar could be gained depending on where a third party looks for the data and what they read. The current state of affairs should be reviewed. In particular, I would argue that given the amount of data available in the two diversity data reports and in the Barometers, the lack of information in the Statistics pages is misleading and arguably demonstrates a lack of transparency on the part of a public body. This is something I suggest the LSB turns its attention towards.

The two "Diversity Data Reports" provide a useful overview of the Bar. However, the data offered up is rather weak in its sophistication. So, for example, while we can see from the 2014 report that 13% of QCs are female, we are told nothing else about them: how many of them are BAME?; how many attended fee paying schools? etc Intersectionality, the idea that there may be intersections between forms or systems discrimination, such that (for example) heterosexual white female QCs may experience the Bar very differently to BAME female QCs and/or lesbian white female QCs, is an important part of discrimination studies. The way in which the BSB currently reports on diversity allows for none of these nuances, or variations, or intersections, to be explored. The 2014 report that it draws on two data sources: Core Database 2014 (i.e. the Bar Council Membership Records) and the Pupillage Registration Survey 2013-2014. What is not clear, from this report, is why the BSB does not also require chambers to submit to them the diversity data they collect, such that this data could be added to the Core Database and Pupillage Survey data sets to give a fuller account of diversity at the Bar. I return to this below.

Looking to the future, the Equality, Diversity and Social Mobility Committee of the Bar Council commissioned a 'Momentum Measures' report in 2014 (Chalkley, 2015). The aim was to understand, "when the profession might reflect the population profile of England & Wales." The 'Momentum

Measures' report focuses solely on gender and ethnicity, as these are the two characteristics for which historical data is available. This is understandable, but disappointing. The report comes to two very strong conclusions in respect of gender (ibid: 2):

“current trends suggest that with the present model of practice at the Bar a 50:50 gender balance among all practising barristers is unlikely ever to be achieved. This is for two reasons: women gave a lower propensity to move from Call to practice and a higher attrition rate once in practice.”

“...in respect of barristers of more than 15 years Call, and of Queen's Counsel, on current trends the practising Bar will not achieve gender balance in the foreseeable future.”

The picture is (in parts) more positive in relation to ethnicity. The report concludes that ethnicity parity (80:20, white:black and minority ethnic) at the practising Bar will be achieved in the near future, but that, “In respect of BAME QCs, on current trends the practising Bar will not achieve an ethnicity balance.” The picture painted thus far is of a Bar (and, indeed, wider legal profession) which does not reflect the society it serves, and in which there are a number of structural and cultural challenges to change. The following section sets out how the LSB has responded to these issues via a rule requiring the collection and reporting of diversity data.

The LSB's Reporting Rule

In December 2010, the LSB issued a consultation paper on “proposals to increase diversity and social mobility in the legal workforce.” As a “first step” towards achieving its statutory obligations in the context of diversity, the LSB intended (2010: 7-8) to introduce a rule requiring transparency by entities about their diversity make-up. Its consultation ran for twelve weeks and ended on 9 March

2011. The LSB's response to the reporting rule consultation exercise was published in July 2011. In it, the LSB states (2011: 8) that "[t]he proposal to publish data at entity level was controversial in consultation." Despite this, the Board of the LSB had decided to proceed. The LSB's reporting "rule" is set out as statutory guidance in Annex B to their July 2011 consultation response document.^{xvi} This required the approved daughter regulators of the legal profession (including the BSB) to submit to the LSB, by January 2012, their plans on how they were going to meet the LSB's expectations with regard to the collection and publication of workforce diversity data (2011: Annex B, 9). In its guidance, the LSB sets out a "suggested approach" (2011: Annex B, 12) made up of four limbs: (i) a requirement on firms and chambers to conduct a diversity monitoring exercise; (ii) the recommended use of a model diversity questionnaire; (iii) a requirement for firms and chambers to publish workforce data; and (iv) a joined-up, consistent approach across each of the regulators.

The BSB's "Approach" document set out how it planned to operationalize the LSB's reporting rule.^{xvii} The specifics are now seen in the BSB's Handbook. Section D1.2 of the BSB Handbook sets out the "Rules" in relation to equality and diversity. Among other matters, this requires chambers to have a written equality and diversity policy, for there to be certain E&D training, for "objective and fair criteria" to be used in selection processes, and for chambers to monitor "the number and percentages of its workforce from different groups." Where disparities are seen in workforce data, chambers are obliged to take "appropriate remedial action" (BSB, 2015: rC110.3.g.iii). Section 7 of the 'Supporting Information' pack that sits alongside the BSB Handbook contains advice on the BSB requirements on workforce diversity data collection and reporting (BSB, 2012). The BSB's "regulatory requirements" oblige each chambers to have a Diversity Data Officer, who is responsible for sending out to the chambers "workforce" (i.e. lawyers and staff) a model diversity data questionnaire contained at the end of the Code (or a comparable questionnaire which meets the same objective). Once the data is collected, "The Diversity Data Officer shall ensure that such data is anonymised and

that an accurate and updated summary of it is published on chambers' website every three years" (BSB, 2012: 19). This was first required before 31 December 2012 (ibid: 23).

The BSB guidance is clear that chambers are prevented from publishing data on religion and on sexual orientation, unless all members of the workforce consent. In addition, chambers must, "exclude diversity data in relation to any characteristic where there is a real risk that individuals could be identified, unless all affected individuals consent" (BSB, 2012: 23). Finally, chambers must publish data which is, "categorised by reference to the job title and seniority of the workforce" (ibid). The remainder of Section 7 is in the form of "Guidance" to the "regulatory requirements". The BSB states (2012: 20) that publication of diversity data is not required where the overall chambers workforce is fewer than 10, or where "the number of individuals identified with any characteristic within any category is fewer than 10" (except, in both cases, where consent is given). These exceptions are not part of the LSB's statutory guidance and, as I argue below, are harmful to the overall aims of the diversity data collection and reporting rule.

While the BSB Handbook requires the collection of workforce diversity data by chambers, and the reporting of that data on the chambers' website, there is no corresponding obligation for the chambers to send a copy of that data to the BSB. This is in contrast to the approach taken by the SRA, where law firms are required to report their diversity data to the regulator.^{xviii} I consider this lacuna to be a mistake. On the BSB website is a link to a presentation given on the scope and content of the diversity monitoring obligations.^{xix} It is not clear when, or to whom, the presentation was given. Two nuggets from the slides are worthy of consideration. First, the presentation says that, "Even anonymised data will not be published without your consent." As set out above, this simply is not true. Second, the slides say, "Point out that your chambers will not compare favourably if the highest percentage is "prefer not to say" or "data not available)." This is interesting as it is not clear from the slides, or to me, how or where a chambers might "compare favourably" in the context of

response rates. Certainly, there is no evidence to suggest that solicitors give work to chambers that, in their opinion, have high completion rates for diversity questionnaires.

Reviews of the LSB Reporting Rule

The first review of the operationalization of the July 2011 statutory guidance on diversity data collection and reporting was published by the LSB in 2013. It found that diversity data was being collected in a number of areas where, historically, data had not previously existed and that the concept of data collection and reporting was seen as having value by the regulators and by many in the profession (LSB, 2013). One area of concern for the LSB arose in relation to response rates. When the BSB sought in 2012 to gather in data itself from individual barristers, a response rate of around 5% only was achieved (BSB, 2014b). This compared, for example, with a 42% response rate for the diversity survey undertaken by the Solicitors Regulation Authority (SRA, 2013). I return to response rates below. One of the narratives of this paper is the BSB as the poor cousin of the SRA, although exactly why this is the case is not clear. It may well reflect differences in the underlying regulated communities and/or differences in scale (with the SRA a larger, richer organization). Equally, it may well reflect a lack of regulatory sophistication on the part of the BSB.

In March 2015, the LSB published a second report on regulators' progress against the July 2011 statutory guidance. This second report concluded that while actions by the regulators had led to the development of a "robust evidence base on diversity", the use of that data by the regulators had lacked statistical sophistication (LSB, 2015a: 3). It called on regulators, where they regulate entities (e.g. law firms, chambers), to, "make sure they have actions in place to ensure firms and chambers publish a summary of their workforce broken down by level of seniority and each characteristics in our guidance (except sexual orientation and belief)" (LSB, 2015a: 14). In the section which follows, I question whether a number of chambers are in compliance with these requirements.

In the context of the Bar, the second progress report by the LSB notes (2015a: 8) that the BSB has completed two data collection and reporting exercises, “using a number of sources in order to publish data in all of the diversity strands in the model questionnaire.” As a result of using these disparate sources, the response rates vary: such that while there is data on gender for 98% of the practising Bar, there is data on socio-economic background for only 19% of the practicing Bar (ibid). The lack of willingness on the part of barristers to complete diversity monitoring questions was a core theme from the BSB’s own 2013 review of the implementation of its equality and diversity rules (2013b: 6). Around a third of chambers interviewed by the BSB during their 2013 review said that their barristers objected to diversity data collection on the ground of invasion of privacy, and 9% of chambers said their barristers objected to the data questionnaire covering “sensitive” matters such as sexual orientation (BSB, 2013b: 23). A November 2013 Board Paper of the BSB on diversity data commented (2013c: 15) that:

“the data [the BSB had available to it] in the areas of disability, religion or belief, sexual orientation and caring responsibilities is not reliable [because of low disclosure levels] and therefore cannot be used for drawing reliable statistical conclusions.”

That paper also notes that a “low disclosure rate relating to diversity characteristics has been an issue for the Bar Council and BSB for several years.” The amount of overall available data in 2013 and 2014 on each characteristic has been extracted and put into Table 1 below, taken from the two “Diversity Data Reports” produced by the BSB.

Table 1: Diversity Data Available for Bar Population in 2013 and 2014

Characteristic	2013 Response Rates	2014 Response Rates
Gender	98.6%	98%
Ethnicity	89.5%	89%
Age	78.2%	79%

Disability	15%	24%
Religion or Belief	12.5%	22%
Sexual Orientation	12.4%	20%
Socio Economic Background	10.6% ^{xx}	20%
Caring Responsibilities	11.8% ^{xxi}	20%

The BSB's 2014 "Report on Diversity at the Bar" says:

"It should be noted that each question on both Barrister Connect and the PRS contains a "prefer not to say" option, allowing each registrant the option of not disclosing. Although prefer not to say responses are minimal in general, the highest rate of prefer not to say was in relation to the questions on religion or belief and sexual orientation. Due to the generally low disclosure rates no one data set can provide an in-depth understanding on the diversity of the Bar." (BSB, 2014: 2.1):

That so many barristers do not disclose or 'prefer not to say' in relation to questions on certain diversity characteristics is striking, and further qualitative work could usefully be done in this area. The LSB could usefully use response rates as one of the success criteria by which it will come to judge progress made by the legal services regulators in relation to the July 2011 statutory guidance (LSB, 2015b: 6). Having set the scene, the following section details the Methodology for this paper, before turning to the data gathered and analysed.

Methodology

This paper draws on data gathered during the summer of 2015 in relation to 180 multi-tenant chambers, half of the total number of chambers that the 2014 annual report of the BSB sets out that it regulates. However, finding out exactly which chambers the BSB regulates proved surprisingly difficult. The BSB does not have a list of those chambers on its website. Instead, when I asked the BSB for this list,^{xxii} I was directed first to the Bar Council and then, by the Bar Council, back to the BSB website and a spreadsheet containing contact information, line by line, for all 15,618 barristers

regulated by the BSB. Multiple barrister contacts suggested that I use data from a privately operated website,^{xxiii} which maintains a list of all chambers. The names of the multi-tenant chambers were taken from that website and then alphabetised. Using a random sequence generator, 180 chambers were chosen from the alphabetised list to review. 18 of the chambers reviewed do not have a website. It is not clear why this is the case, but one might speculate that costs, chamber size and IT expertise are relevant factors. Not having a website, however, is no excuse: the BSB comments (2012: 23) that, “where chambers do not have a website, anonymised [workforce diversity] information should be made available to the public on request.”

Where chambers did have a website, data was collected on whether the chambers had a diversity webpage, whether there was a named diversity contact at the chambers, if the chambers published diversity data and, where data was published, what sort of data was offered up. Of the 180 chambers randomly selected from the list, 2 had been dissolved and 18 had no website. This leaves a working sample size of 160 chambers. Of those 160, 91 (57%) disclosed some form of diversity data. I explore this below. However, finding that data was not always straightforward: only 73 chambers (46%) had a specific section on their website for equality and diversity. Most chambers that disclosed data had a section under a heading ‘About Us’ (or similar) which contained a sub-section on diversity (and a link to the diversity data), though one chambers had their data under a webpage on “Legal Notices”, and others had the data on their pupillage recruitment webpages (even though the data related to the entire workforce). If one of the aims of data reporting is to allow third parties to compare disclosures between chambers, some form of consistency as to place of publication would be useful. 32 chambers (20%) had a named diversity officer on their webpages and/or provided a generic diversity contact email address. 58 chambers (36%) made public their equality and diversity policy(ies).

In the sections which follow, I set out and comment on the data collected during the summer of 2015, in four parts: an overview of which chambers publish data and for which diversity

characteristics; chambers’ interpretation of confidentiality and consent requirements; an analysis of response rates; and a review of the timing of diversity disclosures. What we see, throughout, are nuanced and complex issues of regulatory non-compliance. I have taken the decision not to ‘name and shame’ individual chambers in this piece. My aim is not to offer a polemic on particular sets, but to comment as a whole on the operationalization of the LSB’s statutory guidance on diversity reporting.

Publication of Diversity Data by Chambers

Table 2 shows how many chambers published data by chambers size. The BSB (2013b: 9) splits chambers into ‘small’ chambers (2-19 members), ‘medium’ chambers (20 – 50 members) and ‘large’ chambers (51+ members), and I have used the same groupings for my analysis. A chi square test of the data in Table 2 shows a significant difference in the distribution of disclosure by size of chambers (see Appendix 1). An ANOVA test with Tukey post hoc analysis shows that there is a significant difference between Large chambers and both Medium and Small chambers, but no difference between Medium and Small. This finding may be useful for the BSB in how it supports Small and Medium chambers to disclose diversity data, and may suggest that targeted enforcement and/or education with Small and Medium chambers could be useful. The BSB has recently undertaken a review of chambers’ compliance with its rules, targeted at ‘high impact’ chambers (BSB, 2015b). My data suggests that this targeting was the wrong regulatory approach in the context of the diversity monitoring and reporting rule.

Table 2: Diversity Data Disclosure by Size of Chambers

	Small	Medium	Large	Total
Disclosed Data	11	23	57	91
Did Not Disclose	22	26	21	69
Total	33	49	78	160

At first blush, this appears to be an overall 57% compliance rate: 91 out of 160 chambers published diversity data. The picture of compliance, however, is more nuanced when we come to look at what

data was disclosed, and for whom. Table 4 shows that disclosure by chambers across the various diversity characteristics was mixed,. Whereas all of those chambers which disclosed some data published data on gender, far fewer published data on the age, educational background and/or caring responsibilities of their members.

Table 3: Diversity Data Disclosed by Characteristic

Characteristic	Data Disclosed (Number)	Data Disclosed (Percentage)	2014 BSB Data Collection Response Rates
Gender	91	100%	98%
Ethnicity	83	91.2%	89%
Age	63	69.2%	79%
Disability	71	78%	24%
Educational Background	57	62.6%	20%
Caring Responsibilities	53	58.2%	20%

The final column in Table 4 contains the response rates for the relevant diversity characteristics in relation to the 2014 data gathering exercise that the BSB conducted itself. What this suggests is that, for certain characteristics (age, disability, educational background and caring responsibilities) barristers may be more willing to share that data with their chambers than with the regulator. In not requiring chambers to send their diversity data to the BSB, the regulator is missing an important site of information on its regulated community. This lacuna can be easily fixed with a small amendment to the BSB's rules.

Chambers are prevented from publishing data on the sexual orientation or on the religion or belief of their members by the BSB unless there is consent, "from each of the members of the workforce" (BSB, 2015: rC110(3)(s)(i)). The review of chambers' websites showed that 10 chambers did publish data on sexual orientation and 13 chambers published data on religion/belief. There was some, but not complete, overlap between these two groups of chambers: 4 chambers published data on religion/belief but did not also publish data on sexual orientation; and one chambers published data on sexual orientation but not on religion/belief. Of the 10 chambers publishing data on sexual

orientation, 7 were Large chambers, 1 was Medium and 2 were Small. It would be interesting to explore, in further qualitative work, whether the disclosures on sexual orientation and religion were made by chambers that felt strongly about those characteristics, or whether something else was at play (for example, a misunderstanding that data on those characteristics was not required to be published).

There is little point in publishing data for data's sake. That data must be meaningful. Four chambers published a series of pie charts without any legends, so that while it was (sort of) possible to eyeball percentages (such that one might hazard a guess, say, that half-ish of the tenant barristers were female), any sort of accuracy was impossible. I remain unconvinced that this approach to the BSB Handbook equality rules is sufficient to demonstrate compliance by those chambers. The following section discusses a second area where compliance by chambers with the reporting rules is questionable, namely as regards confidentiality and consent to publish.

Issues of Consent and Confidentiality

A minority of chambers commented, alongside the quantitative data, that they were unable to publish data for characteristic X and/or Y (etc) because a number of diversity questionnaire respondents, "did not consent to the use of their data where the number of individuals identified within any particular characteristic/category was fewer than 10", and/or because the chambers was concerned that publishing data for X and/or Y might risk the identification of individuals. This, I would suggest, is not quite in line with the guidance issued by the BSB. Of the 69 chambers that did not publish diversity data, 4 said on their websites that this was because of a concern over the risk of identification of individuals, and a fifth said it did not publish diversity data because "of data protection rules". A further two chambers said the data was available "on request only". In the guidance to its equality rules, the BSB comments (2012: 23) that:

“If there is a real risk that the publication of the summary of anonymous data would result in the identification of an individual in respect of one or more of their diversity characteristics, chambers are not required to publish that part of the information unless it has consent from the individuals affected.”

17 out of the 91 chambers that disclosed data (19%) made explicit reference, alongside their disclosures, as to consent (10 Large; 7 Medium). Some commented on how they had secured consent to publish the associated data; but the majority spoke of consent in terms of their ability to only publish part of the data they had collected in because of lack of consent. The language on disclosure and consent in the BSB Handbook and associated guidance is unclear. Consent is required “from each of the members of the workforce”: but is this from each member of the workforce that completed the diversity questionnaire?; from each member of the entire workforce (whether or not they completed the questionnaire); or from each member of the workforce that completed the questionnaire and answered the question on (say) sexuality?

In a separate section, the BSB guidance (2012: 24) goes on to say that if consent from “all those affected” is not obtained, then “chambers should still aim to publish a summary of the data expressed in headline terms to indicate a general picture of diversity at chambers”. The BSB gives (ibid) the following as an example:

“Greendale chambers has an underrepresentation of women at QC level and an underrepresentation of BME pupils. It currently has no pupils above the age of 40 and most of the tenants are men.”

Given this, I would argue that those chambers that say on their websites that they do not publish *any* insights as to their workforce because of concerns as to identification and/or because of lack of consent have failed to properly read the BSB’s guidance. I have found the guidance given by the BSB, and the volume of its rules on data collection and disclosure, to be, at times, hard to fathom. As

such, I question whether some chambers believe they are in compliance - because they have (mis)interpreted the rules in one way - when in fact they are not.

Response Rates

30 of the 91 chambers (33%) gave response rates for their respective diversity data collection exercises. Table 5 below sets out the response rates, and details how the response rates were given (i.e. on an aggregate basis for the entire workforce or separately per role).

Table 5: Response Rates to Chambers' Diversity Questionnaires

Grouping	Number	Percentage
Aggregated Workforce Response Rates	18	60%
Rates for each of QCs, Barristers, Pupils + Staff	2	6.7%
Rates for each of QCs, Barristers + Staff	5	16.7%
Rates for 'Members' + Staff ^{xxiv}	1	3.3%
Rates for Barristers + Staff	3	10%
Rates for Barristers	1	3.3%

For the 18 chambers that provided aggregated workforce response rates these varied from 31% to 100%, with a mean of 61%. 3 of these 18 were Small chambers, 6 were Medium and 9 were Large. This division was not statistically significant. In the other chambers that split response rates between lawyers (i.e. QCs, barristers and pupils) and staff, in all but two sets the response rates were higher for staff than for the lawyers. This is striking, and suggests that barristers may feel (for whatever reason) differently about diversity disclosures than the staff who work in their chambers. One might hypothesize that, in the hyper privileged and hyper traditional world of the Bar (Rogers, 2012), barristers believe that anything which marks them out as different and/or as an outsider is potentially harmful. Table 6 below sets out (on a chambers by chambers basis) the response rates achieved for each role type.

Table 6 – Response Rates Per Chambers By Role

Response Categories	QCs	Barristers	Pupils	Staff	Size
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Barristers + Staff		63%		89%	Large
Barristers + Staff		40%		86%	Medium
Barristers + Staff		49%		38%	Large
Members + Staff	89%	89%	89%	100%	Large
QC, Barrister + Staff	100%	75%		100%	Medium
QC, Barrister + Staff	75%	73%		100%	Medium
QC, Barrister + Staff	50%	32%		100%	Large
QC, Barrister + Staff	0%	73%		100%	Large
QC, Barrister + Staff	55%	38%	38%	65%	Large
QC, Barrister, Pupil + Staff	27%	25%	67%	8%	Large
QC, Barrister, Pupil + Staff	100%	100%	100%	100%	Large

The final chambers in Table 6, with a workforce of near 80, managed to achieve a perfect response rate. This is impressive, and suggests that there may be models of good practice on which the BSB could draw by way of offering advice to other chambers.

A Matter of Timing

The BSB requires that workforce diversity data is “published on chambers’ website every three years”, with an initial compliance deadline of the end of December 2012. Given this, and given the current date, one might expect chambers to have published one round of diversity data for 2012. This, however, is not the case. As Table 7 below shows, different chambers have published data for a spread of years, and 22 of the 91 chambers that do disclose data do not say to which year(s) the data relates.

Table 7 – Chambers’ Data Disclosures by Year

Year(s)	Number of Chambers Disclosing	Percentage
2011	1	1.1%
2012	31	34.1%
2012-2013	1	1.1%
2013	20	22%
2013 and 2014	1	1.1%
2014	13	14.3%
2015	2	2.2%
Unknown/Not Disclosed	22	24.2%

If, as has been suggested (BSB, 2011), there is relatively little turnover at the Bar, different chambers publishing data for different years might not be that problematic. What is more problematic, however, is that the BSB does not currently oblige chambers to publish data on a time series basis. That is, the current wording of the BSB Handbook and associated guidance would allow any given chambers to publish data in 2012, and to then publish new data in 2015, without any corresponding obligation to keep public the 2012 data (so that comparisons could be made by third parties). What is also problematic is that while the BSB requires chambers to collect in and report on the composition of its workforce, there is no corresponding obligation on the chambers to say what it does, or will do, to improve diversity where there is a lack of diversity. It would be a relatively easy regulatory change for the BSB to require chambers to both publish diversity data, and to specifically comment on that data. Where disparities are seen in workforce data, chambers are already obliged by the BSB to take “appropriate remedial action” (BSB, 2015: rC110.3.g.iii). A rule requiring public commentary on the diversity data would align well with this existing obligation.

Conclusion

The Bar of England & Wales, like the wider legal profession, does not reflect the society it serves. The current data published by the BSB suggests a profile in relation to gender and ethnicity that gives serious cause for concern. As regards additional diversity characteristics, the BSB (and others) have accepted that the existing data sets are not wholly reliable because of poor response rates to associated diversity questionnaires. In 2011, the LSB introduced mandatory guidance that obliged its daughter regulators to put into place rules that relate to diversity monitoring and reporting across the legal profession. This paper has been concerned with how the BSB has operationalised that statutory guidance in respect of the Bar.

Using data gathered from the websites of 160 chambers, I have demonstrated a significant and sustained narrative of non-compliance by chambers with the BSB’s diversity reporting rules. This, I have suggested, is partly due to the complexity of the BSB’s operationalization of the LSB’s statutory

guidance. Large chambers (those with 51+ members) are significantly more likely to publish data compared with Small or Medium sized chambers. This has important implications for how the BSB targets its enforcement and education activities. Chambers publish far greater data on the gender, ethnicity and age of their barristers and staff than they do in the context of educational background, caring responsibilities and disability status. This selectivity in diversity disclosures (on the part of barristers and their staff) is worthy of further exploration. Response rates are generally higher when chambers collect their own diversity data, as opposed to the BSB asking individual barristers for that data. Given this, the BSB is missing a trick in not requiring chambers to send to the regulator that diversity data on a regular basis.

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[XXXX]

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END NOTES

ⁱ http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/

ⁱⁱ Those doing work for clients are, of course, regulated in other ways: for example, via consumer protection legislation, and the common law of contract.

ⁱⁱⁱ <http://www.sra.org.uk/sra/how-we-work/reports/statistics/regulated-community-statistics.page>

^{iv} This is the latest date for which numbers are available. See: <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/practising-barrister-statistics/>

^v This was removed via the Courts and Legal Services Act 1990

^{vi} The Legal Services Act 2007 permits the creation of Alternative Business Structures, which can see law firms owned and/or managed by non-lawyers.

^{vii} A number of barristers are also employed, working for various organisations. The latest statistics show that around 20% of the bar is employed, by law firms, the government etc – see: <http://www.barcouncil.org.uk/careers/practice-options/employed-bar/>

^{viii} www.qcappointments.org

^{ix} For an account of the Handbook, see: Marc Mason, Marc Mason (2014) UK: Room at the Inns—The Increased Scope of Regulation under the New Bar Standards Board Handbook for England and Wales, Legal Ethics, 17:1, 143-147. For a wider account of how the Legal Services Act 2007 has shaped the Bar, see: Ruth Deech (2011). How the Legal Services Act 2007 has Affected Regulation of the Bar. Legal Information Management, 11, pp 89-91

^x Barristers in the Australian state of Victoria trace their history back to, and are aligned with, the English Bar. This makes them a useful point of comparison.

^{xi} <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/>

^{xii} See the data in the Law Society annual statistical reports (note x above)

^{xiii} <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/research-reports/>

^{xiv} https://www.barstandardsboard.org.uk/media/1643761/diversity_data_report_2014.docx

^{xv} <https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-act-2010-publication-of-information/>

^{xvi} Under Section 162 of the Legal Services Act 2007, the LSB has the power to issue guidance, among other matters, for the purpose of meeting the regulatory objectives.

^{xvii} http://www.legalservicesboard.org.uk/projects/workforce_development/pdf/bsb_action_plan.pdf

^{xviii} See: http://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/diversity-data-collection.page#Collection_4

^{xix} <https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/>

^{xx} 10.6% answered the question on what type of school they attended; 10.2% answered the question as to whether they were in the first generation of their family to attend university

^{xxi} 11.8% answered a question about caring responsibilities for children

^{xxii} Email of XXX date. Copy on file with the author.

^{xxiii} <http://www.venables.co.uk/bar.htm>

^{xxiv} It was not clear whether this was all of the QCs, Barristers and Pupils, or only some combination thereof.

APPENDIX 1 – STATISTICAL TESTS

Chi-Square Tests

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	17,777 ^a	2	,000
Likelihood Ratio	18,149	2	,000
Linear-by-Linear Association	17,156	1	,000
N of Valid Cases	160		

a. 0 cells (,0%) have expected count less than 5. The minimum expected count is 14,23.

ANOVA

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	4,360	2	2,180	9,812	,000
Within Groups	34,884	157	,222		
Total	39,244	159			

Multiple Comparisons

Tukey HSD

(I) SIZE	(J) SIZE	Mean Difference (I-J)	Std. Error	Sig.	95% Confidence Interval	
					Lower Bound	Upper Bound
Small	Medium	-,13605	,10615	,408	-,3872	,1151
	Large	-,39744*	,09789	,000	-,6290	-,1658
Medium	Small	,13605	,10615	,408	-,1151	,3872
	Large	-,26138*	,08592	,008	-,4647	-,0581
Large	Small	,39744*	,09789	,000	,1658	,6290
	Medium	,26138*	,08592	,008	,0581	,4647

*. The mean difference is significant at the 0.05 level.

Tukey HSD^a.

SIZE	N	Subset for alpha = 0.05	
		1	2
Small	33	,3333	
Medium	49	,4694	
Large	78		
Sig.		,342	

Means for groups in homogeneous subsets are displayed.

a. Uses Harmonic Mean Sample Size = 47,221.